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In the

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-509

IN THE MATTER OF JOHN MCCANDISH KING,
Debtor in Proceedings for an Arrangement,

IN THE MATTER OF KING RESOURCES COMPANY AND INTERNATIONAL RESOURCES LIMITED, Debtors in Proceedings for Reorganization of Corporations,

JOHN M. KING,

Petitioner,

v.

CHARLES A. BAER,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

To the Honorable Chief Justice and Associate Justices of The Supreme Court of The United States:

Your petitioner, John M. King, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit entered in the above-entitled case on June 19, 1973.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit to which this petition is addressed, filed on June 19, 1973, is reported at ..... F. 2d ..... and is printed at pages A-1 - A-9 of the Appendix hereto.

The orders and opinion of the referee and of the district court in the matter styled *In re John McCandish King* and numbered 71-B-1630 in the United States District Court for the District of Colorado are not reported but are printed in the Appendix hereto as follows: (i) "Findings, Conclusions and Order on Application of Trustee of King Resources Company to Modify Order Staying Suits," pages A-10 - A-12; (ii) "Order" (of the district court), pages A-13 - A-14.

The excerpts from the transcripts of proceedings before the United States District Court for the District of Colorado in proceedings styled *In re King Resources Company and International Resources Limited* and numbered 71-B-2921 and 72-B-644, embodying the oral findings, conclusions and orders of the court are not reported but are printed in the Appendix hereto at pages A-15 - A-29. The written minute order of said court is printed at pages A-30 - A-31 of the Appendix hereto.

JURISDICTION

This petition for writ of certiorari seeks review of the judgment of the United States Court of Appeals for the Tenth Circuit in three appeals from the United States District Court for the District of Colorado. The three appeals were consolidated and judgment in all three was entered on June 19, 1973. The petitioner was appellant in, and here seeks review of, two of the three appeals.

No. 72-1474 in the Court of Appeals originated in proceedings under Chapter XI of the Bankruptcy Act, 11 U.S.C. §§ 701 et seq., in which your petitioner is debtor. On April 5, 1972, the referee in the Chapter XI proceeding entered his "Findings, Conclusions and Order on Application of Trustee of King Resources Company to Modify Order Staying Suits." On April 14, 1972, your petitioner filed his petition for review of said order by the United States District Court for the District of Colorado under the provisions of Bankruptcy Act § 39, 11 U.S.C. § 67. On June 5, 1972, said District Court entered its order affirming the order of the referee and denying the petition for review. On June 27, 1972, your petitioner filed his Amended Notice of Appeal of said order of the District Court under the provisions of Bankruptcy Act § 24a, b, 11 U.S.C. § 47a, b, and duly perfected such appeal by filing bond.

No. 72-1515 originated in proceedings under Chapter X of the Bankruptcy Act, 11 U.S.C. §§ 501 et seq., in which your petitioner was respondent to an order to show cause why a certain contract should not be rejected as executory under Bankruptcy Act § 116(1), 11 U.S.C. § 516(1). On May 30, 1972, said District Court entered its order authorizing rejection. By Notice of Appeal filed June 27, 1972, and perfected by duly filing appeal bond, your petitioner appealed said order under the provisions of Bankruptcy Act § 23a, b, 11 U.S.C. § 47a, b.

On June 19, 1973, the United States Court of Appeals for the Tenth Circuit entered its judgment denying your petitioner's appeals and affirming the decisions of the courts below. On August 13, 1973, the Court of Appeals stayed mandate until

September 22, 1973, pending the timely filing of a petition for writ of certiorari in the Supreme Court of the United States. If, on or before that date, the clerk of the Court of Appeals receives notice from the Clerk of the Supreme Court that a timely petition for writ of certiorari has been filed, the stay of mandate shall continue until final disposition by the Supreme Court.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Did the proceedings initiated by the King Resources Company Chapter X trustee in the reorganization Court resulting in the rejection of a contract under which John M. King claims to have received vested title to property constitute a "suit"?

2. In view of the circumstance that the United States Internal Revenue Service had a lien upon and had levied upon the property John M. King received under the contract to secure the asserted federal tax liability of King, was the United States Internal Revenue Service an indispensable party to the rejection proceedings in the King Resources Company reorganization court and was mere notice to the Internal Revenue Service of the filing of the application to reject sufficient to join it as a party to the rejection action?

3. Did the King Resources Company reorganization Court have summary jurisdiction to determine title to the property John M. King received under the rejected contract, when there was no finding that the reorganization court had possession of the property nor that King's claim to the property is merely colorable?

4. If the King Resources Company reorganization court had such summary jurisdiction, was it not exercised in an inequitable manner by the reorganization court's failure to condition rejection upon restitution of the money paid by John M. King for the property acquired under the contract?

STATUTES INVOLVED

The statutes and rule involved are printed in the Appendix hereto. They are:

Bankruptcy Act § 63c, 11 U.S.C. § 103c ..... Appendix, A-32
Bankruptcy Act § 116(1), 11 U.S.C. § 516(1) ..... Appendix, A-32
Bankruptcy Act § 202, 11 U.S.C. § 602 ..... Appendix, A-32
Bankruptcy Act § 311, 11 U.S.C. § 711 ..... Appendix, A-32
Bankruptcy Act § 314, 11 U.S.C. § 714 ..... Appendix, A-33
INT. REV. CODE of 1954, § 6321, 26 U.S.C. § 6321 ..... Appendix, A-33
Rule 19, Federal Rules of Civil Procedure ..... Appendix, A-33

STATEMENT OF THE CASE

This Petition asks for a writ of certiorari to the United States Court of Appeals for the Tenth Circuit to review the judgment of that court in three appeals from the United States District Court for the District of Colorado consolidated as involving common questions. Appeal No. 72-1474 in the Court of Appeals arose out of the Chapter XI arrangement proceedings instituted by John M. King ("King"), debtor. Appeals Nos. 72-1515 and 72-1516 arose from reorganization proceedings under Chapter X of the Bankruptcy Act in which King Resources Company ("KRC") and International Resources, Ltd. are debtors. John

M. King is appellant in the first such appeal and The Colorado Corporation is appellant in the second. Charles A. Baer, trustee in the King Resources Company Chapter X proceeding, was appellee in each of the three appeals.

The controversies involving King have their origin in a contract dated December 31, 1969, under which King bought and KRC sold an undivided 1/64 interest in certain Canadian federal oil and gas exploration permits. Such permits give the right, upon the completion of a certain amount of exploration and development work, to obtain oil and gas leases. Such permits are assignable and have value in themselves. Under the contract, King agreed to pay $2,609,120.50 as the purchase price for the interest and another $2,609,120.50 as his pro rata share of costs of exploration and development. As required by the contract, King paid the $260,912.05 initial installment of the purchase price within fifteen days of execution of the contract. Semi-annual payments of $413,110.75 were to be made by King in the years 1970 through 1975. A similar contract was executed between KRC and John W. Mecom. Mecom assigned his 1/64 interest to The Colorado Corporation.

On May 19, 1971, the United States Internal Revenue Service ("IRS") made jeopardy assessments against King personally totaling approximately $5,358,000.00, filed its notice of lien, and made levies.

On June 1, 1971, King filed his original petition under Chapter XI of the Bankruptcy Act (Bankruptcy Act § 301 *et seq.*, 11 U.S.C. § 701 *et seq.*). On that same day, the referee to whom the petition was referred issued, ex parte, an order staying suits and restraining levy, attachment or execution

against King or his property (Bankruptcy Act § 314, 11 U.S.C. § 714.) On August 14, 1971, the KRC Chapter X petition was filed (Bankruptcy Act § 101 *et seq.*, 11 U.S.C. § 501 *et seq.)* and Baer was named trustee.

On March 16, 1972, the KRC trustee filed in the King arrangement proceeding an application asking the referee to determine that an application the trustee proposed to file in the KRC reorganization court (for an order directing King to show cause why the contract with KRC should not be rejected as executory) was not a suit and therefore not stayed by the referee's stay order or, in the alternative, to modify the stay order to permit the trustee to file such application in the KRC reorganization court. King resisted the trustee's application to allow the filing on the grounds that the filing of the application would constitute the commencement of a suit in contravention of the stay order, that King received vested title to his 1/64 interest upon execution of the contract and that such interest was therefore property subject to the exclusive jurisdiction of the King arrangement court (Bankruptcy Act § 311, 11 U.S.C. § 711) and beyond the jurisdiction of the KRC reorganization court, and that the device of rejection of an executory contract could not be used to divest King's vested title. On April 5, 1972, the King arrangement referee held that the filing by the KRC trustee in the KRC reorganization court of an application for an order directing King to show cause why the contract should not be rejected would not constitute the commencement of a suit and thus was not stayed. (A-11 - 12.) The referee concluded that he could neither reach nor rule upon the issue of title to the interest. Such interest was listed on King's schedule of assets in his arrangement pro-

ceeding at a value in excess of $13,000,000.00 and was and is the principal asset to which King's creditors may look for satisfaction of their debts.

King petitioned the district court for review of the referee's decision on the ground that the conclusion that the filing of the trustee's proposed application was not a suit was erroneous as a matter of law. The district court affirmed the referee's decision as not being clearly erroneous and as not constituting an abuse of discretion. (A-14.) King thereupon appealed the district court's decision to the court of appeals, which affirmed the lower courts on the grounds that no abuse of discretion had been shown. (A-6 - A-7.)

While these appeals of the referee's conclusion were in progress, proceedings were under way in the KRC reorganization court, which, on April 5, 1972, ordered King to show cause why the contract should not be rejected as executory. In the KRC court, King moved to dismiss the trustee's application on the ground that the contract was not executory within the meaning of Bankruptcy Act § 116(1), 11 U.S.C. § 516(1), that the interest King obtained under the contract was subject to the exclusive jurisdiction of the King arrangement court and not subject to the jurisdiction of the KRC reorganization court, and on the grounds that the KRC reorganization court did not have possession of the interest and that King's claim thereto was more than merely colorable. King also moved to dismiss for failure to join the IRS as an indispensable party, pointing out that the IRS claimed a lien upon the interest and had constructive possession of the interest pursuant to levy. King also moved to stay proceedings in the KRC reorganization court

pending determination of his appeals of the referee's ruling concerning the stay order.

All of these motions were ruled upon by the KRC reorganization judge on May 31, 1971, at trial on the merits of the trustee's application to reject. The trustee testified that he sought to reject the contract because he wished to handle the permits free of any claim of any third party. He said that the permits were in danger of being forfeited because the necessary exploration and development work was not being done. He further testified that one reason KRC was unable to perform the necessary work was that purchasers from KRC were not making payments of their agreed share of such costs. He also testified that he would be unable to make restitution of the $260,912.05 down payment made by King if the court should condition rejection on restitution.

King testified that, in his opinion, the value of his interest in the permits had appreciated to $63,000,000.00. He further stated that he had not made the payments of his share of costs of exploration called for by the contract because he was not satisfied that such work had, in fact, been done. He further made a conditional offer to pay his share of such costs if the KRC trustee would provide satisfactory evidence that the interests of owners of the permits were being adequately safeguarded. Evidence was also introduced showing that, according to King's books, amounts were owing from KRC to King more than enough to offset the semi-annual payments King was to make to KRC, at least through August 14, 1971, the date the KRC Chapter X petition was filed. The trustee took the position that such offsets were not sufficient, and that KRC was entitled

under the contract to an additional $1,085,803.38 on December 31, 1971, after allowance of all proper payment and credits to King.

The KRC reorganization judge found that King obtained no "possessory rights" under the contract, that the contract therefore represented a chose in action rather than a chose in possession and was therefore executory and rejectable. He declined to stay proceedings pending determination of King's appeal from the ruling of the King arrangement court, and held that the IRS was not an indispensable party to the rejection proceedings, since such proceedings were not a suit and there could be no parties to a proceeding which was not a suit. (A-18 - A-22.) He found that equity and sound business judgment warranted rejection and authorized the trustee to reject the contract with King. The reorganization judge also authorized rejection of the Mecom contract which had been assigned to The Colorado Corporation. (A-28 - A-29.)

King duly appealed the orders of the KRC reorganization court, asserting that the rejection proceedings should have been stayed until determination of King's appeal from the rulings of the arrangement court, asserting that the reorganization judge erred as a matter of law in finding and concluding that the IRS was not an indispensable party and that the contract was executory within the meaning of Bankruptcy Act § 116(1), 11 U.S.C. § 516(1), asserting that the order of the reorganization judge, by implication, divested King of title to his interest, which order was beyond the summary jurisdiction of the reorganization court, asserting that the reorganization court lacked summary jurisdiction to deal with or determine King's

title, and asserting that the order authorizing rejection constituted an abuse of discretion.

The United States Court of Appeals for the Tenth Circuit affirmed all of the orders and judgments of the courts below. The Court of Appeals' opinion states that the refusal of the KRC reorganization judge to stay rejection proceedings pending King's appeal from the orders of the arrangement court was not an abuse of discretion, that the IRS was not an indispensable party, that the contract is executory and that the reorganization court therefor had summary jurisdiction to reject under Bankruptcy Act § 116(1), 11 U.S.C. § 516(1), and that the reorganization court did not abuse its discretion in authorizing rejection. (A-9.)

REASONS FOR ALLOWING THE WRIT

The opinion of the United States Court of Appeals for the Tenth Circuit in this matter calls into question a fundamental and firmly established principal of bankruptcy court jurisdiction — that a bankruptcy court lacks summary jurisdiction to determine issues of title to property when that property is not in the possession of the bankruptcy court and is subject to a more than colorable adverse claim. *Harrison v. Chamberlain,* 271 U.S. 191 (1926); see also cases collected at 2 COLLIER ON BANKRUPTCY, ¶ 23.05[4] p. 488 n. 31, 6 COLLIER ON BANKRUPTCY ¶ 3.05 p. 440 n. 30, p. 448 n. 45 (14th ed. 1971). In substance, the Court of Appeals affirms the summary jurisdiction of the KRC Chapter X reorganization court to determine King's title to the 1/64 interest in the Canadian federal oil and gas exploration permits received under a contract with KRC as an incident to the reorganization

court's jurisdiction to reject the contract under Bankruptcy Act § 116(1)), 11 U.S.C. § 516(1). This is in clear conflict with the ruling ni *In re American National Trust,* 426 F. 2d 1059 (7th Cir. 1970), where it was held that a Chapter X court did *not* obtain summary jurisdiction over property adversely possessed as an incident to jurisdiction to reject. Further, the Court of Appeals here tacitly approves the judgment of the KRC reorganization court which, by implication, divests King of his claimed vested interest in the permits, contrary to the decisions in *Laugharen v. Bank of America,* 80 F. 2d 551 (9th Cir. 1937), *cert. denied* 301 U.S. 699, and *In re H. K. Porter Co.,* 24 F. Supp. 766 (W.D. Pa. 1938), as well as the *American National Trust* decision, *supra,* holding that rejection cannot serve to divest vested title.

The Tenth Circuit opinion not only presents conflicts with the holdings in other circuits on basic principals of bankruptcy jurisdiction but also opens unresolved issues in regard to what constitutes an "executory contract" within the meaning of Bankruptcy Act § 116(1), 11 U.S.C. § 516(1), the nature of rejection proceedings, and the scope of the reorganization court's discretion in authorizing rejection. Since rejection of an allegedly executory contract can severely affect the rights of those who claim to have received vested title to property under the contract, as is the case here, a uniform and settled decision of the circumstances under which a bankruptcy court can reach and decide issues concerning such title, and the rights and equities that must be afforded those who claim such title, is

important to just and proper administration of the bankruptcy laws.

In order to understand the questions presented in this case, it is important to note that the issue of King's title to the 1/64 interest in the permits obtained under the contract with KRC has, from the first, been at the heart of the controversy. This may not be fully apparent from the opinions below but it is abundantly evidenced in the record, which shows that it is the purpose of the KRC trustee and the intention of the KRC reorganization court to divest King of any claim to title of the interest. For example, in his application to reject the contract, the KRC trustee alleges that King should "take nothing" under the contract and that King's interest in the permits "may be of great value to the debtor corporation (KRC)." Before the King arrangement referee, the KRC trustee argued that the KRC reorganization court was the proper forum to determine any question as to King's ownership of his interest. Before the KRC reorganization court, the trustee testified that he wished to reject the contract so that he could deal with the permits "free of any claim of any third person." The KRC reorganization judge, in his opinion authorizing rejection, concluded it would be inequitable to allow King to be "locked in" to an asset purportedly worth $63,000,000.00, and in the KRC trustee's brief to the Tenth Circuit, the trustee argued that rejection was justified because "it is in the best interests of the reorganization estate to reject a contract and thus hold a 63 million dollar asset free from claims * * *"

But the most conclusive evidence of the KRC reorganization

court's intent to divest King of title is the fact that there can be no benefit to KRC by rejection unless King's claim is divested. The KRC reorganization judge could not have found rejection to be sound business judgment unless he concluded that rejection would divest King's claim to title; the Court of Appeals could not have affirmed rejection as an exercise of sound discretion unless it approved and acknowledged such divestment.

The Court of Appeals, in holding that the contract is executory and rejectable within the meaning of Bankruptcy Act § 116(1), 11 U.S.C. § 516(1), is at odds with accepted doctrine. It is true that the contract is executory in the sense that one of the parties has not fully performed; that is, King has not made all the installment payments he is obligated to make. However, KRC completed its performance by fully and completely conveying to King all its right, title and interest in and to the 1/64 interest in the permits upon execution of the contract. In this circumstance, where the debtor has fully performed by conveying complete title and the only unperformed obligation is the purchaser's obligation to pay, the contract has not heretofore been considered executory within the meaning of Bankruptcy Act § 116(1), 11 U.S.C. § 516(1); the trustee's remedy should be an action (plenary, unless the purchaser consents to summary jurisdiction) to recover the purchase price, not rejection and summary retrieval of title. *In re San Francisco Bay Exposition,* 50 F. Supp. 344 (N.D. Cal. 1943); 6 COLLIER ON BANKRUPTCY, ¶ 3.23[1] p. 564 n. 8 (14th ed. 1971).

Quoting language from another decision, the Court of Ap-

peals infers that complex, unperformed obligations remain upon KRC as well as King. This appears to be incorrect. While more exploration and development work must be done to earn mineral leases under the permits, such work is not obligatory in the sense that KRC has promised to perform it; the requirement that the work be done to earn leases is inherent in the nature of the permits and does not have its origin in KRC's contract with King. In regard to such work, KRC's only obligation to King is to use any payments made by King as his pro rata share of the costs of exploration and development for exploration and development. KRC need not even do the work itself; it can (and, in fact did) sell *its* interest in the permits to a purchaser able to do the work. Under these circumstances, KRC cannot be said to have burdensome contractual obligations remaining unperformed.

This case, therefore, presents the question of whether a contract under which the debtor has completely performed by conveying title to property and under which only the purchaser's obligation to pay remains unperformed is an executory contract within the meaning of Bankruptcy Act § 116(1), 11 U.S.C. § 516(1). If heretofore accepted doctrine is correct, such a contract is neither executory nor rejectable and the decisions below are erroneous.

Even more important is the question of whether the KRC Chapter X reorganization court had summary jurisdiction to reach and determine the issue of King's title to the 1/64 interest as an incident to its jurisdiction to reject the contract under which King received the interest (if it had such jurisdiction, in view of the question as to whether the contract is executory).

Although it is not entirely clear from the opinions rendered below, King's basic objection to summary jurisdiction in the reorganization court is that the KRC court did not have actual or constructive possession of King's interest and that his claim to the interest is, at the very least, more than merely colorable. The Court of Appeals appears to have affirmed the KRC reorganization court's summary jurisdiction solely on the basis of Bankruptcy Act § 116(1), 11 U.S.C. § 516(1), and the grounds that the contract was executory. It could not affirm on the basis of possession in the KRC Court or the ground that King's claim is merely colorable. It was the Trustee's burden to obtain findings sufficient to sustain summary jurisdiction. *Wikle v. Country Life Insurance Co.*, 423 F. 2d 151, 153 (9th Cir. 1970); *In re Hayes*, 407 F. 2d 1031, 1033 (6th Cir. 1969); *In re Indiana Flooring Co.*, 62 F. 2d 763, 764 (2d Cir. 1933), *cert. denied* 290 U.S. 627. The Trustee obtained no such findings.[1] Therefore, if what have heretofore been accepted as fundamental principals of bankruptcy court jurisdiction are correct, the decisions below are erroneous.

The conflict between the Court of Appeals decision in this case and the opinion in *In re American National Trust*, 426 F. 2d 1059 (7th Cir. 1970), is quite direct. In the *American*

[1] The KRC reorganization judge found that King acquired no "possessory rights" under the contract, that the contract therefore represented a chose in action rather than a chose in possession and therefore was executory and rejectable. However, he appears to have been of the opinion that the permits are a property interest which, by their nature, do not give the owner "possessory rights." (A-23 - A-29.) Therefore, "possessory rights" are something distinct from "possession" in the sense used in discussing bankruptcy court summary jurisdiction, where title to an intangible gives constructive possession. KRC could no more have had "possessory rights" in the permits than could King. "Possessory rights," therefore, cannot be relevant to a determination of possession for purposes of jurisdiction.

National Trust case, as in this one, the Chapter X trustee attempted to invoke the equitable powers of the bankruptcy court, alleging summary jurisdiction incidental to jurisdiction under Bankruptcy Act § 116(1), 11 U.S.C. § 516(1), to summarily retrieve property which was not in the possession of the Chapter X Court and was subject to a more than colorable adverse claim. There, as here, the trustee's basic argument was such remedy was necessary to prevent the "unjust enrichment" of the owner of the property at the expense of the Chapter X estate. There, unlike the Court of Appeals opinion here, the Seventh Circuit held that the trustee's theory was an unprecedented and unjustifiable extension of the bankruptcy court's summary jurisdiction. The *American National Trust* decision cannot be reconciled with the decision here.[2]

If the *American National Trust* case rule is correct and a Chapter X court lacks summary jurisdiction to deal with property adversely possessed as an incident to rejection, a fortiori, the Chapter X Court cannot divest the purchaser of title vested under the contract. See also *Laugharen v. Bank of America*, 80 F. 2d 551 (9th Cir. 1937), *cert denied* 301 U.S. 699; *In re H. K. Porter Co.*, 24 F. Supp. 766 (W.D. Pa. 1938). Such divestment, however, is precisely the result intended by the KRC reorganization court in this case and tacitly approved by the Court of Appeals.

Only one case has been found where a bankruptcy court divested title as an incident to rejection of an executory con-

[2] In the *American National Trust* case, the Seventh Circuit did allow rejection of unexecuted portions of the contract which placed heavy and speculative burdens on the debtor. As pointed out, page 15, supra, no such unexecuted burdens remain on KRC under the contract in question here.

tract. However, in *In re New York Investors Mutual Group*, 143 F. Supp. 51 (S.D. N.Y. 1956), the trustee held legal title to real property to which the purchaser had acquired equitable title under a contract of sale. Even then, the court required restitution of that portion of the purchase price already paid as a condition to rejection. In other words, rejection in the *New York Investors Mutual Group* case amounted to rescission, not forfeiture. A Chapter X trustee is not excused from the requirement of making restitution as a condition to rescission. *Parker v. Baltimore Paint & Chemical Corp.*, 244 F. Supp. 267, 270 (D.C. Colo. 1965). In this case, not only was restitution of the purchase price paid by King not required, but the KRC trustee admitted he would be unable to make such restitution. In this case, rejection amounts to forfeiture.

It is King's position that title to the 1/64 interest in the permits vested in him *more than one and a half years* before the KRC Chapter X petition was filed. No court has found to the contrary. If title vested a year and a half before bankruptcy can be divested by rejection, no reason appears why title vested five, or ten, or twenty years before bankruptcy cannot be divested. If title to personal and intangible property can be divested, no reason appears why title to tangible and real property cannot be divested. If title can be divested in Chapter X, no reason appears why title cannot be divested in other Chapter proceedings. In this age of thirty-year purchase money mortgages, the incalculable but enormous impact of a doctrine of rejection as divestment need not be emphasized to be obvious.

It is not only the rights of purchasers, such as King, that

may be affected by rejection of an executory contract, as this case illustrates. The KRC reorganization court assumed, and the Court of Appeals affirmed, summary jurisdiction to determine title to King's interest in the permits even though such interest is in the constructive possession of the United States Internal Revenue Service under a levy[3] made before either King's Chapter XI petition or KRC's Chapter X petition was filed and subject to a lien[4] securing King's federal tax liability in the alleged (by the IRS) amount of more than $5,300,000.00.

As the entity in possession of and claimant of a lien upon the property in issue in the rejection action, the Internal Revenue Service would normally be an indispensable party. Whether the IRS lien could or did attach to the interest King claims under the contract, whether the IRS could or did obtain possession of the interest long before KRC's Chapter X petition was filed, whether the IRS lien, if it has one, is or can be divested by rejection of the contract — all of these are questions which cannot be evaded if jurisdiction of the KRC reorganization court must be predicated on possession and/or title; all are questions which cannot be decided without materially affecting the position of the IRS. Disposition of these questions in the absence of the IRS clearly may, as a practical matter, impair or impede the ability of the IRS to protect its $5,300,000.00 interest; the IRS is an indispensable party under Rule 19, Federal Rules of Civil Procedure. See *Steingut v. National City Bank*, 38 F. Supp. 451 (S.D. N.Y. 1941) (attaching cred-

[3] Property levied upon is in the constructive possession of the Internal Revenue Service. *Henkin v. United States*, 229 F. 2d 895 (2d Cir. 1956); *United States v. Eiland*, 223 F. 2d 118 (4th Cir. 1955).

[4] INT. REV. CODE of 1954, §6321, 26 U.S.C. §6321.

itors held indispensable parties to receiver's action to recover bank deposit).

While the KRC reorganization court overruled King's objection to the trustee's failure to join the IRS on the grounds that the rejection action was not a suit and that the IRS could not, therefore, be an indispensable party, the Court of Appeals affirmed on the basis that the IRS had been given notice of the filing of the trustee's application to reject and that even such notice was not required by Bankruptcy Act § 116(1), 11 U.S.C. §516(1). Under these circumstances, the holding of the Court of Appeals that the IRS is not an indispensable party appears to be clearly erroneous. It at least poses a question important in the administration of both the tax laws and the bankruptcy laws.

But it is neither King nor the IRS who is primarily affected by the decision authorizing rejection and divestment; it is the creditors of King, who have filed claims in his Chapter XI arrangement proceeding exceeding $24,000,000.00 (not including the tax liability of nearly $18,000,000.00 asserted by the IRS.) The 1/64 interest in the Canadian permits acquired under the contract with KRC is the primary asset to which King's creditors could look for payment. If any issue is critical to King's Chapter XI proceeding, it is the issue of title to that interest. Yet, when the KRC trustee proposed to file his application to reject, putting that title in issue, the referee held that he could not even reach the question of whether the interest was in the possession of and subject to the exclusive jurisdiction of the King arrangement court under Bankruptcy Act § 311, 11 U.S.C. § 711.

Because it clearly puts King's title in issue, the KRC trustee's rejection action is a suit. Chief Justice Marshall provided the classic definition of suit in *Weston v. Charleston,* 27 U.S. (2 Pet.) 449 (1829), at 464:

> "The term is certainly a very comprehensive one, and is understood to apply to any proceeding in a court of justice, by which an individual pursues that remedy in a court of justice which the law affords him. The modes of proceeding may be various, but if a right is litigated between parties in a court of justice, the proceeding by which the decision of the court is sought, is a suit."

In this case, a right (to title) was litigated in a court of justice. Contrary to the referee's conclusion, the rejection action did not merely involve the KRC trustee "presenting his conclusions about this agreement (the contract) to the reorganization judge." (A-12.) Rejection required "judicial action and decision by the judge and not merely administrative action and decision by the trustee." *In re American National Trust,* 426 F. 2d 1059, 1064 (7th Cir. 1970); see also *Texas Importing Co. v. Banco Popular de Puerto Rico,* 360 F. 2d 582, 584 (5th Cir. 1966). Because King's right to title was litigated before the reorganization court, the rejection action is one of various modes of proceeding that constitutes a suit. The referee's conclusion that it was not a suit and therefore not stayed was clearly erroneous. Because of this error, the referee failed to exercise his discretion to decide if the KRC trustee should be allowed to litigate this matter, critically important to King's Chapter XI arrangement proceeding in the KRC reorganization court.

However, both the district court and the Court of Appeals

affirmed the referee's order on the grounds that it did not constitute an abuse of discretion, although an error in law cannot be an exercise of sound discretion. *In re Central R. Co. of New Jersey*, 163 F. 2d 44, 53 (3d Cir. 1947), *cert. denied* 332 U.S. 810; see also *Douglas v. Beneficial Finance Co.*, 469 F. 2d 453, 454 (9th Cir. 1972); *National Association of Letter Carriers v. Sombrotto*, 449 F. 2d 915, 921 (2d Cir. 1971); *Speare v. Consolidated Assets Corp.*, 360 F. 2d 882, 886 (2d Cir. 1966); *Clemons v. Board of Education*, 228 F. 2d 853, 857 (6th Cir. 1956).

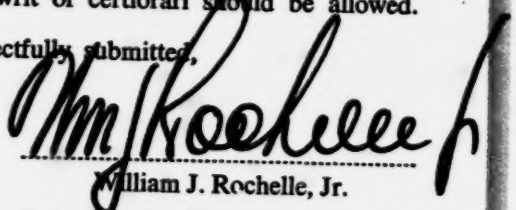
The effect of rejection of an executory contract is not entirely defined. Clearly, rejection constitutes a breach creating a claim for damages. Bankruptcy Act §§ 63c, 202, 11 U.S.C. §§ 103c, 602; *Workman v. Harrison*, 282 F. 2d 693 (10th Cir. 1960). How much more than a mere breach it effects is not clear. It has been suggested that rejection is an action *sui generis*, the effect of which must be determined by the circumstances of the case. *Ray v. Beneficial Finance Co.*, 92 N.J. Super. 519, 224 A. 2d 143 (1966). The most severe effect heretofore is found in *In re New York Investors Mutual Group*. 143 F. Supp. 51 (S.D. N.Y. 1956), where it amounted to rescission. The question of the scope of the relief a trustee may obtain by rejection is important in the administration of the bankruptcy laws.

In any event, it would seem that when rejection puts in issue the title to property received under a contract alleged to be executory, the action constitutes a suit and the parties whose title and interest in the property are at stake are entitled to the safeguards of a plenary proceeding.

CONCLUSION

Because the opinion in this matter of the United States Court of Appeals for the Tenth Circuit is in conflict with principals announced by Courts of Appeal in other circuits, and because this matter presents questions important in the administration of the bankruptcy laws which should be resolved, this petition for writ of certiorari should be allowed.

Respectfully submitted,



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Attorney for the Petitioner

CERTIFICATE OF SERVICE

The undersigned hereby certifies that three copies of this Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit have been served upon each party in accordance with the provisions of paragraph 1 of Rule 33, Revised Rules of the Supreme Court of the United States, by depositing such copies in the United States post office, airmail postage prepaid, this 17th day of September, 1973, addressed to counsel of record for each party at the post office of each such counsel, as follows:

John S. Pfeiffer and Robert J. Kapelke
1900 Security Life Building
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Attorney for The Colorado Corporation, Respondent

William J. Rochelle, Jr.
Attorney for John M. King, Petitioner

APPENDIX

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

MAY, 1973, TERM

In Re John McCandish King, debtor in proceedings for an arrangement, JOHN M. KING, debtor,

Appellant,

No. 72-1474

v.

CHARLES A. BAER, Trustee,

Appellee.

In Re King Resources Company and International Resources Limited, debtors in proceedings for reorganization of corporations, JOHN M. KING,

Appellant,

No. 72-1515

and

THE COLORADO CORPORATION,

Appellant,

No. 72-1516

v.

CHARLES A. BAER, Trustee,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
(D.C. Nos. 71-B-1630, 71-B-2921, 72-B-644)

[Filed June 19, 1973]

Before HILL, Circuit Judge; DURFEE* and HOLLOWAY, Circuit Judge.

HILL, Circuit Judge.

* Court of Claims, sitting by designation.

These three appeals from the District of Colorado stem from proceedings had under Chapters X and XI of the Bankruptcy Act. They involve common questions, thus the consolidation. No. 72-1474 arises out of the Chapter XI arrangement proceedings instituted by John M. King, debtor, who is appellant in that appeal. Nos. 72-1515 and 72-1516 both arise from proceedings had in the Chapter X matter instituted by King Resources Company and International Resources Limited as debtors in the proceedings for reorganization. John M. King is appellant in the first case, and The Colorado Corporation is appellant in the second case. Charles A. Baer, trustee in both bankruptcy proceedings, is appellee in each of the three appeals.

The controversies originate in sales by King Resources Company of two undivided 1/64th interests in Canadian federal oil and gas exploration permits. The contracts under which the interests in the permits were purchased outlined the mode of payment. Each 1/64th interest was to be sold for $5,218,241. The first payment of $260,912.05 was to be paid by the purchaser within fifteen days from the date of execution of the contract. Subsequent payments of $413,110.75 were to be made on June 1 and October 1 of each year from 1970 through 1975 in payment of the contract purchase price. The two purchase contracts which form the basis of these appeals were executed separately by John M. King and John W. Mecom.

King executed a contract to purchase a 1/64th interest on December 31, 1969, and made the initial payment of $260,912.05. He made no further payments, and now asserts his failure to make these payments was because King Resources Company had failed to satisfactorily account for exploration work and had generally failed in its duties to the purchasers. King also contends that King Resources Company owed him

sufficient amounts of money on other activities to more than offset his payment obligation under the contract. The King Resources Company trustee disagreed and claimed that King Resources, after allowance of all proper payments and credits to King, was entitled under the contract to an additional $1,085,803.38 on December 31, 1971.

On May 19, 1971, the United States Internal Revenue Service (IRS) made jeopardy assessments against King personally totaling approximately $5,358,000, filed its notice of lien, and made levies. On June 1, 1971, King filed his original petition for a Chapter XI arrangement under the Bankruptcy Act (11 U.S.C. §701, **et seq.**). On that stame day, the arrangement proceeding referee issued, ex parte, an order staying suits and restraining levy, attachment or execution against King or his property (11 U.S.C. § 714).

On August 14, 1971, King Resources filed its petition for Chapter X reorganization under the Bankruptcy Act (11 U.S.C. § 501, **et seq.**). The petition was approved and the appellee was named as trustee. On March 16, 1972, the trustee filed with the King arrangement referee an application to modify the above referred to order staying suits. Attached to this application was the trustee's proposed application to the King Resources reorganization judge for an order to show cause why the executory contract between King personally and King Resources for the purchase of the interest in the exploration permit should not be rejected.[1] King resisted the trustee's application to modify the stay order on the basis that (1) the filing of the application for permission to reject an executory contract would constitute the commencement of suit in contravention of the stay order; (2) the 1/64th interest was a vested property interest and therefore subject to the exclusive jurisdiction of the King arrangement referee

[1] 11 U.S.C. § 516(1).

and beyond the jurisdiction of the King Resources reorganization judge to authorize rejection as an executory contract; and (3) the device of rejection of an executory contract cannot be used to divest a purchaser of his vested title. The referee on April 5, 1972, granted the appellee's application to modify the stay order, found that the application to reject the executory contract did not constitute the commencement of a suit, and left to the court the resolution of whether the contract was an executory contract. Immediately after this order was issued, the trustee filed with the court his application to reject the executory contract. The court ordered King to show cause why the executory contract should not be rejected by the trustee.

King, in the meantime, had filed an appeal to the United States District Court for review of the referee's order that the application to reject the contract did not constitute the commencement of a suit. On June 2, 1972, the district court affirmed the referee's decision. That decision of the district court has been appealed to this court and constitutes appeal No. 72-1474. King contends that the application to reject the contract as an executory contract was a "suit" and therefore should have been subject to the stay order.

On April 19, 1972, King filed his motion in the King Resources reorganization proceedings to stay final determination of the trustee's application to reject the executory contract pending the district court's review of the arrangement referee's order that the application to reject did not constitute a suit. King also presented a motion to dismiss the trustee's application on the basis that he had acquired a vested property right in the permits under the terms of the contract; therefore there was no executory contract over which the reorganization court could exercise jurisdiction to authorize rejection.

Trial on the merits of the trustee's application to reject the executory contract was held after King had been notified by the district court of its intention to affirm the arrangement referee's determination that the application of the trustee to reject the executory contract did not constitute the commencement of a suit within the proscriptions of the stay order. King initially asked that the trial be stayed pending his appeal to this court from the district court's affirmance of the arrangement referee's decision. This motion, as were motions to dismiss for lack of jurisdiction, for failure to join the IRS as an indispensable party, and for summary judgment, was denied by the trial court. After trial on the merits, the King Resources reorganization court ruled the contract was an executory contract and authorized the appellee to reject it. That decision is the basis of appeal No. 72-1515. In that appeal King asserts error in the trial court's refusals to grant his motion to stay, his motion to dismiss for lack of jurisdiction on his allegation that title had vested and therefore there was no executory contract, and his motion to dismiss for failure to join the IRS as an indispensable party. He also attacks the order authorizing rejection of the contract and contends this order, by implication, either erroneously divested him of his vested title or incorrectly found that title had not vested.

The Colorado Corporation, appellant in No. 72-1516, raises basically the same contentions raised by King in appeal No. 72-1515. On December 24, 1969, John W. Mecom executed a contract for the purchase of an individed 1/64th interest in Canadian federal oil and gas exploration permits being sold by King Resources. The terms of the contract were the same as that of King. Mecom made the initial payment of $260,-912.05 and, like King, made no further payments as required by the contract. On May 24, 1971, The Colorado Corporation

acquired the Mecom interest. On April 5, 1972, the trustee filed with the reorganization court his application to reject the contract as an executory contract. That court issued its order to The Colorado Corporation to show cause why the executory contract should not be rejected. The Colorado Corporation responded with its motion to dismiss in which it alleged its acquisition from Mecom was of his vested property interest which he had acquired under the contract. It also challenged the jurisdiction of the reorganization court and contended both the contract and the interest acquired were no longer executory. Trial on the merits was held concurrently as to both contracts. The trial court, following trial on the merits and the pronouncement of its order permitting rejection of the executory contract with King, made the same order equally applicable to The Colorado Corporation and authorized the trustee's rejection of the executory contract. The Colorado Corporation in its appeal raises issues which were also raised by King in No. 72-1515. These contentions will be dealt with concurrently, and therefore need not be separately stated at this juncture.

No. 72-1474

In this appeal, it is the appellant King's contention that the application to reject the executory contract was a suit which should have been stayed under the provisions of the arrangement referee's stay order. As the decision to issue an injunction staying the commencement of suits is committed to the discretion of the bankruptcy referee,[2] we do not deem it necessary to determine the status of the trustee's application to reject the executory contract as a suit. So too the decision of the referee to vacate a previously issued restraining order or to allow other proceedings relating to the

[2] In Re Schokbeton Indus. 449 F.2d 321 (5th Cir. 1971); In Re Laufer, 230 F.2d 866 (2d Cir. 1956).

debtor's property is discretionary.[3] We find no abuse of the arrangement referee's discretion in permitting the trustee's application to reject the executory contract.

We now consider those issues raised only by appellant King in No. 72-1515 regarding asserted errors committed by the King Resources reorganization court. The first error challenges the court's denial of King's motion to stay, pending appeal of the district court's approval, proceedings relating to the trustee's rejection application. King contends the appeal in that case involved the basic question of the jurisdiction of the arrangement court and should, therefore, have been determined before this proceeding was allowed to continue. Appellant's reliance on Texaco, Inc. v. Liberty Nat'l Bank & Trust Co., 464 F.2d 389 (10th Cir. 1972), is misplaced. In the instant case each of the two courts was a court of bankruptcy, and each was exercising its own exclusive jurisdiction of the bankruptcy proceeding before it. In this situation the granting or denial of a motion to stay is within the sound discretion of the court.[4] There was no abuse of discretion.

King next contends the court erroneously denied his motion to dismiss for failure to join the IRS as an indispensable party. The contention is that the IRS, by virtue of its jeopardy assessments and levy on the property of King, had an interest in this property also and therefore should have been joined. The law is clear that "before an executory contract should be rejected, a judicial hearing and inquiry, at which interested parties might be heard, should be held, and that an executory contract could be rejected only with the permission of the court. * * *" Texas Importing Co. v. Banco Popular de Puerto

[3] See Mundt v. Southland Savings & Loan Ass'n, 354 F.2d 81 (9th Cir. 1965).

[4] See Pet Milk Company v. Ritter, 323 F.2d 586 (10th Cir. 1963).

Rico, 360 F.2d 582 (5th Cir. 1966). The notice requirements for the rejection of executory contracts require only notice to the parties to such contracts. Any notice to other parties lies in the discretion of the judge.[5] It is apparent that the IRS was not entitled to any form of notice regarding the rejection of the executory contract. We note, however, that the trial court ordered that notice be given to creditors who had filed statements under §§ 210 and 211 of the Bankruptcy Act. 11 U.S.C. §§ 610, 611. The trial court further found that the IRS did have notice of the hearing. Their failure to attend the hearing may properly be taken as indicative of their intention not to appear. The IRS was not an indispensable party to the rejection hearing.

Nos. 72-1515 and 72-1516

The remaining contentions are raised by appellants in both No. 72-1515 and No. 72-1516 and will be jointly resolved in this opinion. The first of these arguments challenges the determination by the reorganization judge that the contract was executory and therefore rejectable. The challenge takes various forms; however the basic contention is that a property interest in the exploration permits had vested under the contract, and therefore the contract no longer remained executory. Appellants urge the contract was beyond the jurisdiction of the reorganization court to reject, but rather was within the exclusive jurisdiction of the arrangement court. In Workman v. Harrison, 282 F.2d 693, 699 (10th Cir. 1960), we upheld the rejection of a contract which "was then

[5] 11 U.S.C. § 516 provides: "Upon approval of a petition, the judge may, in addition to the jurisdiction, powers and duties in this chapter conferred and imposed upon him and the court— (1) permit the rejection of executory contracts of the debtor except contracts in the public authority, **upon notice to the parties to such contracts** and to such other parties in interest as the judge may designate." (Emphasis added).

executory in nature, neither party having completely performed and the obligations of each remaining complex." Our decision there was based on the highly speculative probability of success and the additional expenditure of large sums of money which made the continued performance of the contract both "burdensome and risky." We hold the trial court here correctly found the contract to be executory, and properly permitted its rejection.

Appellants next assert error in the reorganization court's rejection of the executory contracts without also requiring restitution of the purchase price paid by each under the contracts. Rejection of the executory contract constitutes a breach of contract as a matter of law which entitles the other party to the contract to assert a claim for such breach for determination by the court.[6] There is no basis for the requirement of restitution upon the rejection of the executory contract.

Appellants last challenge the decision to reject the executory contract as not being warranted by the dictates of equity or sound business judgment.[7] The rejection of an executory contract is committed to the discretion of the judge, and will be reversed only on a showing of abuse of that discretion.[8]

We find no such abuse here.

Each of the judgments appealed from is affirmed.

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[6] Workman v. Harrison, 282 F.2d 693 (10th Cir. 1960).

[7] Group of Institutional Investors v. Chicago, M., St. P. & P. R. Co., 318 U.S. 523 (1943).

[8] 6 Collier on Bankruptcy, ¶ 3.23[4] at 571.

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

IN THE MATTER OF JOHN McCANDISH KING,
Debtor in Proceedings for an Arrangement

No. 71-B-1630

FINDINGS, CONCLUSIONS AND ORDER ON APPLICATION OF TRUSTEE OF KING RESOURCES COMPANY TO MODIFY ORDER STAYING SUITS

[Filed April 5, 1972]

This matter came on for hearing on an application filed herein on March 16, 1972 by John S. Pfeiffer as attorney for Charles A. Baer, Trustee for King Resources Company, Debtor, and for International Resources Limited, Debtor, which application is designated "Application to Modify Order Staying Suits" and the applicant having appeared in person and by his attorneys, John S. Pfeiffer and Robert Kapelke and the Debtor appeared by his attorneys, Louis G. Isaacson and William J. Rochelle, Jr.

Upon consideration of the subject application, the memoranda submitted for the parties and the statements of counsel, the following are made as the findings of facts and conclusions of law:

1. In this proceeding for an arrangement under Chapter XI of the Bankruptcy Act an order was entered, ex parte, on June 1, 1971, upon the Debtor's application of that date, which ordered provided, inter alia

> "• • • that all persons be and they hereby are, enjoined and stayed until final decree herein from commencing or continuing any suit against John McCandish King, the

above named Debtor, other than a suit to enforce a lien upon his property; * * *"

2. Charles A. Baer is the duly appointed, qualified and acting Trustee of King Resources Company and International Resources Limited, debtors in proceedings for reorganization pursuant to Chapter X of the Bankruptcy Act, pending as numbers 71-B-2921 and 72-B-644 in the United States District Court for the District of Colorado.

3. John M. King, the Debtor herein, and King Resources Company, the Debtor in No. 71-B-2921, entered into written agreement, dated December 31, 1969, a true copy of which is attached as Exhibit A to Trustee's Application No. 23 tendered with the subject application.

4. Trustee's Application No. 23—For On Order to Show Cause as to Why the Trustee Should Not Reject Executory Contract with John M. King is an attempt by the reorganization Trustee to exercise the power conferred upon the reorganization judge by Section 116(1) of the Bankruptcy Act, which, in relevant part, provides:

"* * * the judge may * * * (1) permit the rejection of executory contracts of the debtor, * * * upon notice to the parties to such contracts and to such other parties in interest as the judge may designate;"

5. The sole question now before this Court in this arrangement proceeding is whether this attempt by the Trustee constitutes the commencement of a suit against John McCandish King and it is the opinion of the undersigned that it is not.

6. In arriving a the conclusion that the filing of Trustee's Application No. 23 and the issuance of an order to show cause does not constitute the commencement of a suit within the meaning of the stay order of June 1, 1971 and within the meaning of Section 314 of the Bankruptcy Act, the under-

signed has made no effort to determine whether or not the agreement of December 31, 1969 is an executory contract within the meaning of Section 116 of the Bankruptcy Act. That question is to be determined by the reorganization judge. The ruling made here is limited to the conclusion that no outstanding order in this arrangement proceeding prevents the Trustee from presenting his contentions about this agreement to the reorganization judge.

Upon the foregoing, it is ORDERED, that the subject Application to Modify Order Staying Suits is Granted and nothing contained in the order entered herein on June 1, 1971, designated as Order Staying Suits and Restraining Levy, Attachment or Execution shall be construed to prevent Charles A. Baer, Trustee, from proceeding to file in the reorganization proceedings, for King Resources Company and International Resources Limited, Nos. 71-B-2921 and 72-B-644 an application in the form of Trustee's Application No. 23 attached to the subject Application to Modify Order Staying Suits.

Dated: April 5, 1972

BY THE COURT:

/s/ Richard P. Matsch

.....

Referee in Bankruptcy

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

IN THE MATTER OF JOHN McCANDISH KING,
Debtor in Proceedings for an Arrangement
No. 71-B-1630

ORDER
[Filed June 5, 1972]

THIS MATTER is before the Court on the Petition for Review of John M. King, the above-named Debtor, for review of an Order entered on April 5, 1972, by Richard P. Matsch, Referee in Bankruptcy.

The question before the Referee was whether Charles A. Baer, as Trustee of King Resources Company, Debtor, in the Chapter X corporate reorganization proceedings now pending in this Court, was precluded by the general stay order entered by the Referee from filing "Trustee's Application No. 23—For an Order to Show Cause as to Why the Trustee Should Not Reject Executory Contract With John M. King," in the King Resources Company proceedings.

The Referee held that the filing of such application would not constitute the commencement of a "suit" within the meaning of the Stay Order entered on June 1, 1971 and Section 314 of the Bankruptcy Act, Title 11 U.S.C., Section 714.

The Court has reviewed the files, the proceedings before the Referee, the briefs filed by the parties and the transcript. Pursuant to stipulation of the parties, the present Petition for Review was presented for determination by this Court without oral argument.

It is the conclusion of this Court, guided by Order 47 of the General Orders of Bankruptcy that the findings of fact and

conclusions by the Referee are not clearly erroneous and are therefore accepted and adopted by this Court. The Court further finds that there has been no abuse of discretion by the Referee.

The Referee was free to interpret his own order of June 1, 1971, and the conclusions expressed in his Order of April 5, 1972, find support in the record.

IT IS THEREFORE ORDERED that the Order of the Referee dated April 5, 1972, be and it is hereby affirmed and the Petition for Review be and hereby is denied.

DATED at Denver, Colorado, this 2 day of June, 1972.

BY THE COURT:

/s/ Sherman G. Finesilver

Judge Sherman G. Finesilver

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

IN THE MATTER OF KING RESOURCES COMPANY and INTERNATIONAL RESOURCES LIMITED
Debtors in Proceedings for Reorganization of Corporations

No's. 71-B-2921 and 72-B-644

TRANSCRIPT OF PROCEEDINGS

Argument of Counsel and Ruling of Court on Motions to Dismiss

[9] * * * MR. ROCHELLE: If I may now present our Supplemental Motion to Dismiss for Failure to Join Indispensable Party. This motion—here is a copy for Your Honor.

THE COURT: I've got it here. Mr. Kerr gave me one. Thank you. I'm just reading it.

MR. ROCHELLE: This motion points out that prior to the filing by John King of his Petition for an Arrangement in this court, Internal Revenue Service made a jeopardy assessment against Respondent for Federal taxes due allegedly in the amount of 5 million dollars and immediately caused levies to be made against all of the property of the Respondent; and the levy was among others served upon King Resources Company prior to the filing by it of its Petition for Reorganization in this Court.

By reason of the levy, Internal Revenue Service not only claims a lien on all property of the Debtor, including his interest in the Arctic Island and permits, which is the subject of this application, but also claims possession of the interest.

We deny indebtedness for taxes owed the United [10] States in the enormous amount which they claim, but we may have

tax liability in a substantial amount. The amount is yet to be determined by the Arrangement Court for the simple reason that the IRS has refused up until this date to file a claim so that we can get to bat on that question.

There are in the Arrangement proceedings claimants other than the United States who have filed claims, some 78 of them to this point, in amounts greater than 24 million dollars.

The Debtor, we believe, has the right to have his pre-petition taxes paid out of pre-petition assets and we think that the other creditors of John M. King have the right to have their claim paid, with IRS relying on pre-petition assets for the satisfaction of its debts.

Now, under Rule 19 of the Federal Rules of Civil Procedure, the Internal Revenue Service has such an interest relating to the subject matter of Application 23 that the disposition of the action in its absence might impair or exceed its ability to project any interest. Also, and within the meaning of Rule 19, the Respondent, who is also already a party in this case, and his other creditors to whom he owes fiduciary obligations would be left with a substantial risk of having their rights reduced and affected by reason of the claimed interest of the Internal Revenue Service, being in effect, taken away from them.

[11] We believe that within the meaning of Rule 19, IRS is subject to service of process and its joinder in this case would not deprive this Court of jurisdiction of the subject matter, if indeed this Court has jurisdiction which, of course, we have all along denied.

We think that under applicable and controlling law that IRS in this matter is an indispensable party. We call the Court's attention in the Brief —

THE COURT: To **Larsen.**

MR. ROCHELLE: —to **Larsen** and to **Steingut,** which was a very similar case where there were four attaching creditors who under New York law had liens and the Court held there that these attaching creditors were, in fact, indispensable parties; and I've quoted language of the Supreme Court and Moore's Rules of Federal Practice to the effect that if the United States is an indispensable party defendant and not considered to be sued, the action must be dismissed.

Now, whether or not the United States would consent to be sued in this case, I have no idea, but we feel that they are indispensable and that the Trustee must, in fact, join them as a party defendant in this matter before it can proceed.

Now, this is a thing which has been called to the attention of counsel and this Court at least twice in briefs and once in pre-trial hearing in chambers. We'd assumed that they would have been joined; they have not been. We feel it's [12] incumbent upon us to bring this lack of joinder to the attention of the Court.

MR. PFEIFFER: Please the Court, I've received this specific motion this morning. I've been trying to locate the certificate of mailings and so forth, that we have. We are, at the present time, proceeding under Section 116(1) of the Bankruptcy Act and it states that the judge may permit the rejection of executory contracts of the Debtor, except contracts in the public authority, upon notice to the parties to such contracts and to such other parties in interest as the judge may designate.

When this matter was presented to Your Honor, Your Honor designated those parties to receive notice of this, all of the 210 and 211 parties, which includes the Internal Revenue Service and includes Continental Illinois Bank. They are a party to this procedure. They have received notice. They have not

elected to come forth and be heard. I don't believe that they are an indispensable party.

THE COURT. You're a step beyond me. Maybe my thinking is fuzzy. I could use some help from counsel in straightening out my thinking.

It seems to me that Judge Finesilver has ruled that the rejection of an executory contract is not a suit. And if my thinking is correct, I have before me the question of whether something which a fellow judge of this Court has [13] held is not a suit, should be approved.

Now, if that be true, how can Rule 19 apply to joinder in something which is not a suit?

I realize you're not the right person to address this question to. I realize the question should rather be addressed to Mr. Rochelle, because I'm sure you would happily agree with my reasoning, Mr. Pfeiffer. I would be surprised if you disagreed with that line of thinking. But let's give Mr. Rochelle a chance to respond to that.

MR. PFEIFFER: Fine. We feel that all the notice provision is in Section 116(1), Your Honor.

THE COURT: All right.

MR. ROCHELLE: Your Honor, this action, or whatever we should call it—

THE COURT: What do you call it?

MR. ROCHELLE: I call it a suit, as the Court well knows.

THE COURT: I know you do, but at the moment, Mr. Rochelle, I feel that I am bound by Judge Finesilver's ruling.

MR. ROCHELLE: I understand that.

THE COURT: And accordingly, at the moment—

MR. ROCHELLE: But at the very least, Your Honor, this is a proceeding in bankruptcy and the general orders in bankruptcy provide—

[14] THE COURT: Yes.

MR. ROCHELLE: —that the Federal Rules of Civil Procedure—

THE COURT: That's right.

MR. ROCHELLE: —are fully applicable in proceedings in bankruptcy—

THE COURT: I understand.

MR. ROCHELLE: —unless clearly inconsistent with the Act. And I think there is no inconsistency here.

Whether this is called a suit or whether it isn't, all of the requirements of due process are applicable and the failure to join an indispensable party in a proceeding, an action, a suit, or whatever this might be called, is in our judgment denial and deprivation of due process.

THE COURT: But who's being deprived of the due process?

MR. ROCHELLE: Internal Revenue Service and the Debtor because the Debtor has an interest—

THE COURT: I can understand your statement as to the Internal Revenue Service. Explain it to me as to the Debtor.

MR. ROCHELLE: For this reason, Your Honor, we have stated to the Arrangement Court at the first instance in this proceeding, the first meeting of creditors, that the Plan of the Debtor to be filed would encompass a participation by the [15] creditors of the Debtor in future acquired assets of the Debtor. That was our intention. It still is.

THE COURT: I understand.

MR. ROCHELLE: Now, as the Court well knows, a discharge in bankruptcy does not run to Internal Revenue obligations unless they are over three years old, and then only in certain very narrow circumstances; in other words, nondischargeable debt.

THE COURT: I've had clients that have been confronted with that very problem. I'm very well aware of that fact.

MR. ROCHELLE: And unless the obligation, whatever it may ultimately be, to IRS is satisfied out of assets held by the Debtor prior to his filing the petition, then IRS will be able to, from here on out, deprive the unsecured creditors of Mr. King's estate of the privilege of participating in future acquired assets.

THE COURT: Where you're trying to lead me is this, Mr. Rochelle, is you're trying to lead me right into **Larsen**, and that says that since the Internal Revenue Service hasn't consented to be sued, nobody can be sued.

MR. ROCHELLE: I'm not saying that.

THE COURT: Well, that's the result you're trying to get me to.

MR. ROCHELLE: **Larsen** was a different fact situation, [16] I would admit. I referred to that in the brief.

THE COURT: Yes.

MR. ROCHELLE: Because Moore relied on it and because of the language of Mr. Chief Justice Vincent, but it's up to IRS to raise the question.

THE COURT: It's up to IRS to raise the question. They have had notice of the hearing. They seem to have no interest in the hearing. I observe no one in the courtroom that I recognize as representing II

MR. ROCHELLE: It's not up to us to call them.

Your Honor, I may be suffering under vast misconception, but the only way I know of that anyone can be made a party to an action is by issuance of some sort of process against them or by their voluntarily appearing.

THE COURT: But, Mr. Rochelle, Judge Finesilver ruled this wasn't an action.

MR. ROCHELLE: He ruled this was not a suit under the injunction. He has not, I don't think, Your Honor, ruled that it's not an action. But the Order to Show Cause, Your Honor, under Rule 33—

THE COURT: Mr. Rochelle, a summons applies to lawsuits.

MR. ROCHELLE: The way that most of the proceedings in bankruptcy are initiated, Your Honor, as the Court well knows, is by the issuance of an Order to Show Cause pursuant [17] to an application.

THE COURT: That's correct.

MR. ROCHELLE: That is the same as a summons in an ordinary plenary suit. And no such summons has been issued to IRS in this suit, and that's the only way they can be made a party.

Now, as I read the law, the absence of an indispensable party can be raised even on Appeal—

THE COURT: For the first time.

MR. ROCHELLE: For the first time—sua sponte, if necessary, by the Court.

THE COURT: That's correct.

MR. ROCHELLE: Now, ours has been no disposition to lay behind the log on this matter.

THE COURT: I agree, you alerted me.

MR. ROCHELLE: And we feel that IRS must be in this because they have a lien. We may dispel the lien later, and I hope we do, but right now there is no question about it, they have one.

THE COURT: Mr. Rochelle, the record should be abundantly clear that, although your motion was filed just this morning, you certainly gave us fair warning of your position well in advance of this morning. This is not a last minute attack on the question. I fully recognize that.

MR. ROCHELLE: Thank you, Your Honor.

[18] THE COURT: Very well. The Motion to Dismiss for Failure to Join an Indispensable Party will be denied. We will go ahead on the hearing.

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MR. ROCHELLE: Excuse me. Do I correctly understand that the Respondent's Motion to Dismiss for Lack of Jurisdiction is carried along with the case?

THE COURT: Oh, sure.

MR. ROCHELLE: Just wanted to be sure.

THE COURT: I don't know how I could get rid of it, Mr. Rochelle. I'd like to.

MR. PFEIFFER: We also—there have been summary judgment motions filed by both parties, but I assume that the Court, itself, will rule upon those.

THE COURT: I indicated at the pre-trial conference [19] that I did not want to consider the summary judgment motions separate and apart from the trial itself.

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TRANSCRIPT OF PROCEEDINGS
Findings, Conclusions and Order of the Court

[179] [THE COURT:] As I understand the position of Mr. King here, he says he has a vested interest, is that correct?

MR. ROCHELLE: It's quite correct, Your Honor.

THE COURT: In what?

MR. ROCHELLE: In an undivided 1/64 interest in the Arctic permits.

THE COURT: I understand that, but is it in real estate or is it in personalty?

MR. ROCHELLE: It's in personalty.

THE COURT: Well, then, you and I are getting along pretty well so far.

Now, is it, in fact, personalty—at least we're in agreement it isn't real estate—the contract says that it should be construed pursuant to the law of the State of Colorado. Nobody has given me any suggestion as to what the law of the State of Colorado is as to the nature of these interests.

[180] Under the law of the State of Colorado, what's a working interest? Do we allow the Louisiana rule or the Oklahoma rule or a rule all our own?

MR. ROCHELLE: Your Honor, the contract says the law of the State of Colorado shall apply in the interpretation of the contract. I think that the subject matter of the contract must take its measure from the law of the forum which created it, which is the Government of Canada.

THE COURT: I'm not so sure of that. And how do I find out what the law of Canada is? Who's going to educate me on that?

When the parties see fit to draw a contract which says that the law of Colorado shall apply and when you hand me a document, which I think I know what it is under the law of Colorado—and gentlemen nobody has given me any help as to these things—what possessory rights does the holder of a working interest have? What possessory rights does the holder of an overriding royalty have? What possessory rights does the holder of a hunting and fishing permit on private land have? What possessory rights does the holder of a permit to use US forest land for commercial guide purposes have? What possessory rights does the holder of a permit to conduct geophysical testing on lands withdrawn under the mining laws of the United States have?

I think the answers to those questions are rather [181] vital to this case, gentlemen.

Now, let me ask you this: What comparisons have you made between the Canadian permits, with which we are here confronted, and permits not infrequently issued by the Department of the Interior in this country for purposes of exploration? Are you at all familiar with them?

MR. ROCHELLE: I'm familiar with the Canadian permits, Your Honor, because we went to the trouble of getting an opinion from a Canadian lawyer, twenty pages long. We did not introduce it in this matter because it was stipulated that the interest was not real property and we didn't think it was material.

THE COURT: I understand it's not real property, we are in agreement on that. But, gentlemen, let me say this, that I am of the belief that with the possible exception of the working interest, under the law of the State of Colorado, none of the other interests create a possessory right.

I think you're all puzzled by why I'm so fascinated as to

whether it creates a possessory right or whether it does not. Let me tell you why I am quite interested in that. I got into this a little earlier today, but nobody would rise to the bait.

The possessory right is the key test of whether this contract represents a chose in possession or a chose in action.

Now, if you will consult a work so elementary and [182] basic as American Jurisprudence, you will find that a chose in action is typically defined as an executory contract and a chose in possession is defined to be the exact opposite of an executory contract.

I recognize that you gentlemen have a hearing tomorrow before the Referee in Bankruptcy. I think it only fair that you know what my thinking is, and I propose to tell you that now, but I shall formalize this by a written Order. It's too late in the day for me to dictate an impromptu Order to be appealed, but I think it only fair that you know basically what I think, and I surely shall expand on this in the written Order.

I think that Mr. King entered into a contract with King Resources. I think that under that contract—let me find it here—well, I'm having trouble. One reason is I've got the wrong file.

I think that under that contract Mr. King agreed to pay certain sums of money, part of which—half of which—were purchase price, half of which were variously described as exploration costs and various types of expenses. The total price which Mr. King apparently agreed to pay was $5,218,214.

He made the down payment. That's the only payment he did make. I fully recognize that Mr. King says that that's all he owed for several reasons, among which are the reasons that only the down payment should be applied on purchase price [183] and that he had setoffs.

To arrive at the first conclusion, Mr. King reads one sentence from paragraph 6 of the Agreement, namely, the sentence: "All subsequent payments shall be applied on exploration work until purchaser's share of costs of exploration shall have been paid. Thereafter all amounts shall be paid on the purchase price."

Mr. King quits reading there. The Agreement doesn't end there. It goes ahead:

"Provided that at any time amounts KRC received from purchaser are in excess of funds currently needed for purchaser's share of exploration costs, KRC shall notify purchaser and shall apply the excess upon the unpaid portion of the purchase price."

I think the evidence clearly establishes and has established and I find that Mr. King was, in fact, in default under this Agreement.

I further find that he has failed to establish that he has sufficient setoffs recognizable under the law which would discharge his obligation to make the payments which have already accrued and become due under the contract.

And it is for these reasons, then, that I find that Mr. King is in default.

I am fascinated by testimony which shows that in the space of eighteen months, property for which Mr. King [184] contracted to pay 5 million dollars and has, in fact, paid approximately a quarter of a million dollars and that's all, has now in the opinion of Mr. King reached the value of 63 million dollars.

It has been urged that equitable principals apply. I agree. Indeed, I do agree. I have difficulty finding, as a matter of equity, that equity requires that what amounts to a down

payment of—let's see, it would be 5% in round figures—that a 5% down payment, with the default in the installments which have accrued in the interim, should result in cementing John King personally into an investment which he says has increased in value from 5 million to 63 million in eighteen months; and that he should do this at the expense of the stockholders and creditors in the Chapter X proceeding.

Now, I recognize that the creditors of John King are also entitled to consideration. And I recognize that we have the difficult situation hereof two bankruptcies, where all I can do is to adopt equitable principals which will do the most people the most good.

I find from the evidence that the business judgment exercised by Mr. Baer in electing and deciding to reject this contract, was and is reasonable, competent, and I think it fair to say, excellent business judgment, particularly if the testimony of Mr. King be accepted. I think that the testimony of Mr. King served to magnify the wisdom of Mr. Baer's [185] judgment in rejecting this contract.

I think it apparent from what I've already said that I believe I find, I conclude and I hold, that the contract in question is, in fact and in law, an executory contract which is subject to rejection by the Trustee pursuant to the provisions of Section 116.1 of the Bankruptcy Act, 11 USC, Section 5161.

I authorize expressly the Trustee to reject that certain contract which was made and entered into December 3, 1969, by and between King Resources Company, a Maine Corporation, and John M. King, which contract I have found, of course, and I have held is an executory contract and which contract, of course, is the subject of the Order to Show Cause which initiated the hearing we have had here today.

Now, gentlemen, I said some fifteen minutes ago that I was

just going to briefly comment on what I was going to hold and I find that I got carried away. Accordingly, this will be the Order of the Court, Findings and Conclusions of the Court and no further written Order will be entered; and the Order will be effective as of this date, so that you can get going in a hurry on your Appeal.

I think you'd rather have an inartfully phrased Order subject to an immediate Appeal than you would rather have me hold you around here until I could get up an Order in which I might like the grammar a little better.

[186] But you'd like to get going, wouldn't you, Mr. Rochelle?

MR. ROCHELLE: Your Honor, there's not that big a rush about it. If the Court would like to take more time to prepare—

THE COURT: No, I'm not happy with it. The Court of Appeals is just going to have to get used to my poor grammar.

MR. PFEIFFER: If it please the Court, I think if that is the ruling of the Court, I would like to have the Court comment on two things: One, that the claim of the Chapter XI Arrangement has the exclusive jurisdiction over this, and I believe in your discussion you should make some statement as to non-possessory rights. I would like the Court to make a finding in regard to whether John M. King or The Colorado Corporation acquired any possessory rights by reason of these agreements.

THE COURT: Every finding and conclusion I have made is fully applicable to The Colorado Corporation and every finding and conclusion I have made as to John M. King is binding on The Colorado Corporation. I will not repeat them, I will just expressly state that. I thought I had. But the contract neither gives John M. King nor The Colorado Corpora-

tion any possessory rights in the property. And I know I mentioned it in the earlier discussion. If I failed to find it, it was an oversight, but I add that to my findings.

[187] MR. PFEIFFER: I don't believe so. I assume by that you're saying the Arrangement proceeding does not have exclusive jurisdiction.

THE COURT: Correct.

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IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

IN THE MATTER OF KING RESOURCES COMPANY and INTERNATIONAL RESOURCES LIMITED, Debtors in Proceedings for Reorganization of Corporations

No's. 71-B-2921 and 72-B-644

TRIAL TO COURT ON TRUSTEE'S APPLICATIONS NO. 23 AND 24

[Filed May 30, 1972]

In Open Court

9:00 A.M. Court convenes.

ORDERED: The amended motion of King's attorney to stay is **denied.**

ORDERED: The Supplemental Motion to dismiss for failure to name indispensable parties is **denied.**

ORDERED: Motion of Colorado Corporation to stay is **denied.**

9:45 A.M. — Court recess to allow counsel to go up to the Court of Appeals on the Motion to Stay.

10:45 A.M. — Counsel advises the Court that the Court of Appeals has denied the Motion to Stay and this hearing continues.

Trustee Exhibits 1-2-3-4-5 (Rec'd).

Trustee Charles Baer takes the stand.

11:10 A.M. — Trustee rests.

Colorado Corporation Exhibits 3-4-5-6 (Rec'd).

King Exhibits A-B-C-D-E-F-G-H-I-J (Received).

John M. King takes the stand.

12:00 — Court recess to 1:30 P.M.

1:30 P.M. — Court reconvenes.

John M. King resumes the stand.

Respondent witness — David Coffey Trustee Exhibit 6 — (Rec'd).

4:50 — Respondents Rest.

Trustee Charles Baer is recalled to the stand.

ORDERED: By reference.

5:00 P.M. — The Court's findings as given orally from the bench determines that John King is in default and the Trustee is permitted to reject the contract.

5:10 P.M. — Recess.

Bankruptcy Act § 63c, 11 U.S.C. § 103c:

Notwithstanding any State law to the contrary, the rejection of an executory contract or unexpired lease, as provided in this Act, shall constitute a breach of such contract or lease as of the date of the filing of the petition initiating a proceeding under this Act.

Bankruptcy Act § 116(1), 11 U.S.C. § 516(1):

Upon the approval of a petition, the judge may, in addition to the jurisdiction, powers, and duties hereinabove and elsewhere in this chapter conferred and imposed upon him and the court—

> (1) permit the rejection of executory contracts of the debtor, except contracts in the public authority, upon notice to the parties to such contracts and to such other parties in interest as the judge may designate:

Bankruptcy Act § 202, 11 U.S.C. § 602:

Sec. 202. In case an executory contract shall be rejected pursuant to the provisions of a plan or to the permission of the court given in a proceeding under this chapter, or shall have been rejected by a trustee or receiver in bankruptcy or receiver in equity in a prior pending proceeding, any person injured by such rejection shall, for the purposes of this chapter and of the plan, its acceptance and confirmation, be deemed a creditor. * * *

Bankruptcy Act § 311, 11 U.S.C. § 711:

Where not inconsistent with the provisions of this chapter, the court in which the petition is filed shall, for the purposes of this chapter, have exclusive jurisdiction of the debtor and his property, wherever located.

Bankruptcy Act § 314, 11 U.S.C. § 714:

The court may, in addition to the relief provided by section 11 of this Act and elsewhere under this chapter, enjoin or stay until final decree the commencement or continuation of suits other than suits to enforce liens upon the property of a debtor, and may, upon notice and for cause shown, enjoin or stay until final decree any act or the commencement or continuation of any proceeding to enforce any lien upon the property of a debtor.

Internal Revenue Code of 1954, § 6321; 26 U.S.C. § 6321:

If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount (including any interest, additional amount, addition to tax, or assessable penalty, together with any costs that may accrue in addition thereto) shall be a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such person. Aug. 16, 1954, c. 736, 68A Stat. 779.

Federal Rules of Civil Procedure:

Rule 19. Joinder of Persons Needed for Just Adjudication.

(a) Persons to Be Joined if Feasible. A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in his absence complete relief cannot be accorded among those already parties, or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest. If he has not been so joined,

the court shall order that he be made a party. If he should join as a plaintiff but refuses to do so, he may be made a defendant, or, in a proper case, an involuntary plaintiff. If the joined party objects to venue and his joinder would render the venue of the action improper, he shall be dismissed from the action.

(b) Determination by Court Whenever Joinder Not Feasible. If a person as described in subdivision (a) (1)-(2) hereof cannot be made a party, the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable. The factors to be considered by the court include: first, to what extent a judgment rendered in the person's absence might be prejudicial to him or those already parties; second, the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; third, whether a judgment rendered in the person's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.

(c) Pleading Reasons for Nonjoinder. A pleading asserting a claim for relief shall state the names, if known to the pleader, of any persons as described in subdivision (a) (1)-(2) hereof who are not joined, and the reasons why they are not joined.

(d) Exception of Class Actions. This rule is subject to the provisions of Rule 23.